



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
428 J Street • Suite 620 • Sacramento, CA 95814-2329
(916) 322-5660 • Fax (916) 322-0886

August 19, 2015

Sheila Carbahal
Winters Cemetery District
415 Cemetery Dr.
Winters, CA 95694

Re: Your Request for Advice
Our File No. A 15-137

Dear Ms. Carbahal:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the “Act”)¹ and Section 1090. Please note that we do not advise on any other area of law, including Public Contract Code or common law conflicts of interest. We are also not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate.

We have forwarded your request to the Attorney General’s Office and the Yolo County District Attorney’s Office and we did not receive a written response from either entity. (See Section 1097.1(c)(4).) Finally, we are required to advise you that the following advice is not admissible in a criminal proceeding against any individual other than the requestor. (See Section 1097.1(c)(5).)

QUESTION

Does either the Act or Section 1090 prohibit the Winters Cemetery District from purchasing a used backhoe from your husband’s company when you are the Cemetery District’s manager?

CONCLUSION

Yes. Section 1090 prohibits you from participating in any aspect of the backhoe contract, but the Cemetery District may enter the contract, provided you recuse yourself from any participation whatsoever, including preliminary discussions, negotiations or other involvement in forming the contract.

FACTS

You are the manager for the Winters Cemetery District. The Cemetery District is run by a five-member Board of Trustees. Recently the Board has begun looking into obtaining its own backhoe so it does not have to contract with an outside vendor to dig gravesites.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

Your husband owns 51% of a construction company that is selling a backhoe that it can no longer use. Your husband has offered to sell the backhoe to the Cemetery District and have it appraised beforehand. As the manager for the Cemetery District, you would be involved in any contract to purchase such equipment. Additionally, other than a groundskeeper, you are the Cemetery District's only employee. When the Cemetery District makes a purchase such as this, however, the county handles the contract and money exchange. The Board of Trustees must vote to approve any such contract and at least one of the members must sign on the Cemetery District's behalf.

ANALYSIS

Section 1090

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 concerns financial interests, other than remote or minimal interests, that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies. (*Stigall v. Taft* (1962) 58 Cal.2d 565, 569.) Section 1090 is intended not only to strike at actual impropriety, but also to strike at the appearance of impropriety. (*City of Imperial Beach v. Bailey* (1980) 103Cal.App.3d 191, 197.)

Under Section 1090, the prohibited act is the making of a contract in which the official has a financial interest. (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.)

Steps One and Two: Are you subject to the provisions of Section 1090 and is a contract at issue?

Section 1090 provides, in part, that “[m]embers of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members.” As the Cemetery District's manager, you are therefore covered under this prohibition as a city employee.

To determine whether a contract is involved in the decision, one may look to general principles of contract law (84 Ops.Cal.Atty.Gen. 34, 36 (2001);² 78 Ops.Cal.Atty.Gen. 230, 234 (1995)), while keeping in mind that “specific rules applicable to Sections 1090 and 1097 require that we view the transactions in a broad manner and avoid narrow and technical definitions of

² We note that opinions issued by the Attorney General's Office are entitled to considerable weight (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 17), especially where, as here, it has regularly provided advice concerning a particular area of law. (*Thorpe v. Long Beach Community College Dist.*, (2000) 83 Cal.App.4th 655, 662; *Freedom Newspapers, Inc. v. Orange County Employees Retirement System* (1993) 6 Cal.4th 821, 829.)

‘contract.’” (*People v. Honig, supra*, at p. 351 citing *Stigall, supra*, at pp. 569, 571.) Here, the Cemetery District would enter into a contract to purchase a backhoe.

Step Three: Are you making or participating in making a contract?

Typically, a contract is “made” on mutual assent of the involved parties. (*Stigall, supra*, at p. 569.) In addition, making or participating in making a contract has been broadly construed to include those instances where a public official has influence over the contract or its terms. (See 80 Ops. Cal. Atty. Gen. 41 (1997).) No contract is “made” and no duties attach until one party has offered and another has accepted and consideration is exchanged. But before this, there are “negotiations, discussions, reasoning, planning, and give and take,” all of which are instrumental in “making” the agreement. (*Stigall, supra*, at p. 569.) As the Cemetery District’s manager, you would not sign the contract, but you would be involved in initial discussions and negotiations regarding the purchase.

Step Four: Do you have a financial interest in the contract?

Under Section 1090, officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*People v. Honig, supra*, at p. 333.) Although Section 1090 does not specifically define the term “financial interest,” case law and Attorney General opinions state that prohibited financial interests may be indirect as well as direct, and may involve financial losses, or the possibility of losses, as well as the prospect of pecuniary gain. (*People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn. 5; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).)

A member of a board or commission always has a financial interest in his or her spouse’s source of income for purposes of Section 1090. (*Glover Advice Letter*, A-14-138; *Sodergren Advice Letter*, A-14-202.) Here, you would have a financial interest in the contract by virtue of your husband’s 51% ownership stake of the business that would profit from the sale.

Step Five: Does an exception apply?

There are several statutory exceptions to the prohibition in Section 1090. The remote interests in Section 1091 apply only to the members of a body or board, and do not apply to employees. None of the non-interest exceptions in Section 1091.5 appear to apply. Additionally, the “rule of necessity” occasionally applies to allow a body to enter into a contract in which a member has a prohibitive conflict of interest and there is no alternate source for the contract. This rule also does not apply.

Because you have a conflict of interest under Section 1090, if the District decides to proceed with purchasing this particular backhoe, you may not participate in any phase of the contract, including the initial terms and the appraisal. Section 1090 does not bar a board from entering into a contract based on an employee’s conflict of interest. The Cemetery District’s trustees may pursue this contract provided that a trustee or another employee (or perhaps the county counsel, if there is no other employee) represents the Cemetery District. (See e.g., 80 Ops Cal. Atty. Gen. 41(1997),

finding an agency is not prohibited from contracting if the employee disqualifies him or herself from any participation.)

The Act

When a public official has a prohibitive conflict of interest under the Act, he or she may not make, participate in making, or influence the governmental decision. Because Section 1090 already prohibits you from any participation in this transaction and contract, we need not determine whether a similar bar applies under the Act.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Hyla P. Wagner
General Counsel

/s/

By: Heather M. Rowan
Senior Counsel, Legal Division

HMR:jgl